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SUPREME COURT, U. S.

No. 109

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, ET AL,

Petitioners,

vs.

**INTERSTATE NATURAL GAS COMPANY,
ET AL**

Defendants.

**PETITION OF MEMPHIS LIGHT, GAS & WATER
DIVISION FOR A WRIT OF CERTIORARI TO
THE U. S. CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

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Your petitioner, Memphis Light, Gas & Water Division, an arm or branch of the government of the City of Memphis, Tennessee, created by Chapter 381 of the Private Acts of Tennessee for the year 1939, prays that a writ of certiorari issue to review the order of the U. S. Circuit Court of Appeals for the Fifth Circuit directing the ~~distribution~~ distribution of impounded funds entered in the above entitled case on May 12, 1948.

OPINION BELOW

The opinion of the U. S. Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 Fed. 2nd 796.

JURISDICTION

The order of the Circuit Court of Appeals was entered on May 12, 1948 (R. 109-112). The jurisdiction of this Court is invoked under the provision of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Your petitioner adopts and incorporates herein as a part of its petition the petition of the Solicitor General on behalf of the Federal Power Commission filed with the record herein on June 21, 1948, and, for the purpose of brevity, does not copy herein said petition including specifically the questions presented, statement, specifications of error and reasons for granting the writ, but for the purpose of further presenting its interest in said controversy, submits the following:

SUPPLEMENTAL STATEMENT AND ADDITIONAL REASONS FOR GRANTING WRIT.

Petitioner, Memphis Light, Gas & Water Division, is owned by the citizens and residents of Memphis, Tennessee, to whom it sells and distributes at retail natural gas at rates fixed by the City of Memphis, and neither your petitioner nor said City are subject to regulatory control either by the Federal Power Commission or the Railroad and Public Utilities Commission of the State of Tennessee. (R. 25).

Petitioner purchases its requirements of natural gas from the Memphis Natural Gas Company, Inc., whose pipe lines connect with those of United Gas Pipe Line Company and Interstate Natural Gas Company. (R. 25). The rates at which Memphis Natural sells petitioner gas are subject to control by Federal Power Commission and, in fixing the rates to be charged petitioner in 1943, by its opinion No. 104 dated September 21, 1943, had in mind the reduction of Interstate Natural Gas Company's rates involved in this proceeding, as shown by the following quotation from that opinion:

"The Company also purchases gas from Interstate Natural Gas Company, Inc. During the course of the negotiations the Commission issued its investigation of the Interstate Natural Gas Company, Inc. (Docket No. G-149). This order is now in litigation. Representatives of the Company have stated, however, that any future benefit the Company may receive by reason of the aforesaid rate-reduction order will be passed on to its customers." (R. 27 and 28.)

By its intervention, claiming title to certain of the funds (R. 42-47), Memphis Natural repudiates or denies this agreement.

Of the funds impounded and now to be distributed, \$387,347.00 was paid by your petitioner and its owners and customers. (R. 26 and 30.)

The Court below, following *Central States v. Muscatine*, 324 U. S. 138, ordered refund to the distributing pipe line companies "such distribution to the three pipe line companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof." (R. 105.) Such order, although stating expressly to the contrary, is cer-

tainly, with prejudice to and a foreclosure of the rights of your petitioner who paid to Memphis Natural Gas Company \$387,347.00 of the money paid by it to the United Pipe Line. The Court below, having impounded the fund, is now the only court who can see to it that this money is returned to petitioner. There is no state statute in Tennessee permitting any suit by petitioner against the Memphis Natural Gas Company for this overpayment. The rate of Memphis Natural was expressly fixed in 1943, as shown by the opinion of the Federal Power Commission, upon the understanding that any future benefits of the reduction of Interstate's rates would be passed on to its customers. The rates paid by petitioner to Memphis Natural were thus fixed by the Federal Power Commission in accordance with this understanding, and the Federal Power Commission is now without power to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U.S.C. 717 d; Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591. Therefore, unless it is now held that the Court below incorrectly interpreted Central States v. Muscatine, or unless said decision is modified, the ultimate consumers are without remedy for obtaining the refund of the overpayment. This results in some intermediary company's obtaining an unlooked-for windfall, and is violative of the principles of the Natural Gas Act for the protection of ultimate consumers. Until Central States v. Muscatine, there was never any doubt about the ability of a court to relieve any injustice following the issuance of any of its process. Inland Steel Company v. U. S., 306 U.S. 153; U. S. v. Morgan, 307 U.S. 183.

We submit that this is still the law and that the interpretation placed upon Central States case is erroneous and should be by this Court corrected.

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CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari, and the petition of the Federal Power Commission for such a writ, should be granted.

MEMPHIS LIGHT, GAS & WATER DIVISION
By CHAS. C. CRABTREE,

Attorney..

WESLEY W. HARVELL
Of Counsel.

August, 1948.